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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 498

Estate of LOUIS GOLDSTEIN, IDA GOLDSTEIN and ARNOLD GOLDSTEIN, Executrix and Executor,

Petitioners,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

J. V. Dillon, attorney, on behalf of Ida Goldstein and Arnold Goldstein, executrix and executor for the estate of Louis Goldstein, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on July 13, 1954.

Opinions Below.

The opinion of the Court of Claims (App. p. 11), *infra*, has not yet been reported.

Jurisdiction.

The judgment of the Court of Claims was entered on July 13, 1954 (App. p. 11). The jurisdiction of this court is invoked under 28 U. S. C. 1255 and Rule 19(2) of the Revised Rules of the Supreme Court of the United States.

Question Presented.

Are the proceeds of a life insurance policy includible in the taxable estate of the insured where the insured gives every right of ownership in the policy to the beneficiary and only retains the right to approve during his lifetime any exercise of the rights of ownership by the beneficiary.

Statutes Involved.

Section 811(g)(2) as amended by Section 404(a) of the Revenue Act of 1942 which in pertinent part provides:

> Sec. 404. Proceeds of Life Insurance (Revenue Act of 1942, Title IV, Part I, Enacted October 21, 1942).
>
> (a) General Rule.—Section 811(g) (relating to life insurance) is amended to read as follows:
>
> "(g) Proceeds of Life Insurance,—
>
> "(1) Receivable by the Executor—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.
>
> "(2) Receivable by Other Beneficiaries.—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent (A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by

the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person.

For the purposes of Clause (A) of this paragraph, if the decedent Transferred, by Assignment or Otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer.

For the purposes of clause (B) of this paragraph, the term 'incident of ownership' does not include reversionary interest.

(3) Transfer Not a Gift.—The amount receivable under a policy of insurance Transferred, by Assignment or Otherwise, by the decedent shall not be includible under paragraph (2) (A) if the Transfer did not constitute a gift, in whole or in part, under Chapter 4, or, in case the Transfer was made at a time when Chapter 4 was not in effect, would not have constituted a gift, in whole or in part, under such chapter had it been in effect at such time.

(c) Decedents to Which Amendments Applicable.—The amendments made by Subsection (a) shall be applicable only to estates of decedents dying after the date of the enactment of this Act; but in determining the proportion of the premiums or other consideration paid directly or indirectly by the decedent (but not the total premiums paid) the amount so paid by the decedent on or before January 10, 1941, shall be excluded if at no time after such date the decedent possessed an incident of ownership in the policy."

And Treasury Decision 5239 (Cum. Bull. 1943, p. 1081) amending Section 81.27 of Treasury Regulations promulgated under the Internal Revenue Code providing (App. p. 24).

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> Sec. 81.27 [as amended by T. D. 5239, 1943 Cum. Bull. 1081, 1092, 1093, 1094]. Insurance Receivable by Other Beneficiaries.—(a) In Case of decedent dying after October 21, 1942.—The regulations prescribed under this subchapter (except as otherwise indicated herein or in subsection (b) of this section) are applicable only in the case of decedents who died after October 12, 1942, the date of the enactment of the Revenue Act of 1942. In such cases, the amount of the aggregate proceeds of all insurance on the life of the decedent, not receivable by or for the benefit of his estate must also be included in his gross estate, as follows:
>
> (1) Such insurance (not includible under (2) of this subsection) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in the proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance and,
>
> (2) Such insurance with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any person.
>
> * * * * * *
>
> For the purposes of this section, the term "incidents of ownership" is not confined to ownership in the technical legal sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent. For the purposes of this subsection, the term "incidents of ownership" includes the inci-

dents of ownership described in subsection (b) (except as provided in the next sentence) and, in addition, includes incidents of ownership possessed by the decedent as manager of the community where the insurance policy is properly held as community property by the decedent and spouse. Section 811(g)(2), as added by the Revenue Act of 1942, expressly provides that for the purposes of section 811(g)(2)(B) (see (2) of this subsection), but not for the purposes of section 811(g)(2)(A) (see (1) of this subsection), the term "incidents of ownership" does not include a reversionary interest. However, an assignment of an insurance policy by a decedent possessing other incidents of ownership therein under which he reserves a reversionary interest may result in the proceeds of the policy being includible in his gross estate under section 811(c). See section 81.25.

• • • • • •

(b) In case of decedent dying on or before October 21, 1942.—

• • • • • •

Incidents of ownership in the policy include, for example, the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possesses an incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example, if the proceeds would become payable to his estate or payable as he might direct, should the beneficiary predecease him.

• • • • • •

Suit filed in United States Court of Claims under provisions, Title 28 U. S. C. Section 1490.

Statement.

On July 13, 1939, there were issued three insurance policies on the life of Louis Goldstein. The applications for policies numbered 1331135 and 1331136 were signed by Louis Goldstein, the decedent, as the "applicant", these applications being dated June 30, 1939. These applications contained, at the bottom of the left-hand side, a block with the following statement at the top thereof:

> This application is made at the instance and request of the undersigned, who will pay the premiums out of his, her, or its funds, and who ratifies the foregoing representations, statements, answers and agreements.

There is then space for a signature with the following statement: "Signature of person who will pay the premiums." The application for policy numbered 1331135, in the amount of $25,000, named Frances Figler, daughter of decedent, as primary beneficiary, and her signature appears in the block above mentioned. The application for policy numbered 1331136, in the amount of $40,000, named Lillian Furst, decedent's daughter, as primary beneficiary, and her signature appears as the person who will pay the premiums. Frances Figler and Lillian Furst signed the applications at or about the same time as Louis Goldstein, the decedent.

No separate application was made for policy numbered 1331137 as explained later.

After these applications had been signed and before the policies were issued, the decedent, Louis Goldstein, filed an amendment of his application with respect to policies numbered 1331135 and 1331136. The application, signed by Louis Goldstein, stated as follows:

> I agree to this policy being issued with ownership and the privilege to change the beneficiary vesting in the beneficiary, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

With respect to policy numbered 1331137, for which no separate application was filed but which was issued naming Frances Figler as beneficiary and in the amount of $15,000, the decedent filed an amendment to the application filed on June 30, 1939, stating as follows:

> I agree to accept an additional policy for $15,000.00 with ownership and the privilege to change the beneficiary vesting in the beneficiary, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

When the three above-mentioned insurance policies were issued each contained the following typewritten provision:

> SECTION A.
>
> BENEFICIARY AND OWNERSHIP PROVISIONS.
>
> A 1. Ownership. The beneficiary herein named may exercise every right and receive every benefit, reserved to the insured or the owner of the policy, including the right of assignment, and including the privilege to change the beneficiary, and may agree with the Company to any change in or amendment of the policy without the consent of the insured, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

It was further provided in policies numbered 1331135 and 1331137 with respect to "BENEFICIARY" that "The net sum payable on the death of the insured shall be paid to Frances Figler, his daughter, her executors, administrators

or assigns". The policy numbered 1331136 contained a similar provision with respect to Lillian Furst.

All the premiums on the above three policies were paid by the decedent.

No attempt was ever made, prior to the decedent's death, by either of the beneficiaries named in the policies to exercise any rights under the policies.

The petitioners are the executrix and executor, respectively of the estate of Louis Goldstein, who died in 1945. A Federal Estate Tax return was filed and the tax shown by the return to be due was paid. The taxing authorities asserted that there was a deficiency based, so far as here material, upon the failure to include in the gross estate of the decedent the proceeds of the three policies of insurance *supra* amounting to $82,970.64. The deficiency was paid, a claim for refund was filed and rejected and suit was brought in the United States Court of Claims. That Court concluded that as a matter of law the plaintiffs were not entitled to recover and accordingly dismissed the petition.

The decision of the Court of Claims is predicated on the proposition that the right reserved to the insured (deceased) to veto any exercise of the rights of ownership by the beneficiary in each policy was an incident of ownership within the meaning of the statute and the regulation.

Reasons for Granting the Writ.

The decision in this case has far reaching effects on the taxability of the proceeds of every life insurance policy. It is submitted that the decision of the Court of Claims erroneously interprets the statute and the regulation promulgated pursuant thereto. Furthermore, if the regulation intended to include the right of veto on the part of the

insured as "an incident of ownership" within the meaning of the statute it is not pursuant to the statute but in extension thereof.

The right reserved to the insured entailed no economic benefits. He could exercise no right of ownership. While it is true that none of the rights exercisable under the policy could be exercised by the beneficiary without the written consent of the decedent insured, it is reiterated that under no circumstances could the insured exercise any right of ownership in the policy. The power to limit the unrestricted right of ownership of the owner of the policy does not entail economic benefits and where there is no economic benefit, there is no taxability within the meaning of the statute.

The whole tenor of the cases dealing with "incidents of ownership" which would subject the proceeds of a life insurance policy to the federal estate tax is that the insured or his estate must have some economic interest in the policy or a positive right to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. See *Chase National Bank* v. *U. S.*, 278 U. S. 327; *McKelvy* v. *Comm.*, 82 F. (2d) 935, reversing 31 BTA 1206, (1935); *Robinson* v. *U. S.*, 12 F. Supp. 550 (1935).

In the instant case the insured possessed no such right with or without the consent of the beneficiaries. And the Court of Claims erred in concluding that the right to veto or approve the exercise of rights by the beneficiaries was an incident of ownership within the meaning of the statute or regulation.

Conclusion.

This case presents a question of federal law which is of general widespread importance. Every life insurance policy holder is entitled to know with certainty the taxability of the proceeds of his policy. The decision of the Court of Claims in this case does not interpret the applicable law and regulation but is in drastic extension thereof and is in conflict with the tenor of the cases dealing with the same subject. Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. V. Dillon,
Attorney for Petitioners.

APPENDIX.

Opinion.

IN THE UNITED STATES COURT OF CLAIMS

No. 50270

(Decided July 13, 1954)

Estate of LOUIS GOLDSTEIN, IDA GOLDSTEIN and ARNOLD GOLDSTEIN, Executrix and Executor, 59 West 12th Street, New York City, N. Y. *v.* THE UNITED STATES.

Mr. ALFRED CERCEO for plaintiffs.

Mrs. ELIZABETH B. DAVIS, with whom was Mr. Assistant Attorney General H. BRAIN HOLLAND, for defendant. Mr. ANDREW D. SHARPE was on the brief.

MADDEN, Judge, delivered the opinion of the court:

The plaintiffs are the executrix and executor, respectively, of the estate of Louis Goldstein, who died in 1945. A federal estate tax return was filed and the tax shown by the return to be due was paid. The taxing authorities asserted that there was a deficiency based, so far as here material, upon the failure to include in the gross estate of the decedent the proceeds of three policies of life insurance amounting to $82,970.64. The deficiency was paid, a claim for refund was filed and rejected, and this suit was brought.

The three insurance policies were issued on July 13, 1939, on the application of the decedent. The decedent filed amendments to his applications which said:

> I agree to this policy being issued with ownership and the privilege to change the beneficiary vesting in the beneficiary, except that during the lifetime of Louis

Goldstein, the insured, his written consent must first be obtained.

When the policies were issued, each contained the following typewritten provision:

SECTION A.

BENEFICIARY AND OWNERSHIP PROVISIONS.

A 1. OWNERSHIP. The beneficiary herein named may exercise every right and receive every benefit reserved to the insured or the owner of the policy, including the right of assignment, and including the privilege to change the beneficiary, and may agree with the Company to any change in or amendment of the policy without the consent of the insured, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

In two of the policies it was provided that the net sum payable upon the death of the insured should be paid to Frances Figler, the insured's daughter, "her executors, administrators, or assigns". A similar provision, naming Lillian Furst as the beneficiary, was contained in the third policy.

All of the premiums on the three policies were paid by the decedent. No attempt was ever made, prior to the decedent's death, by either of the beneficiaries, to exercise any of the rights mentioned in the policies.

Section 811 (g) (2) (B) of the Internal Revenue Code provides that there shall be included in the gross estate of the decedent, for estate tax purposes, the amount receivable by a beneficiary of an insurance policy upon the life of the decedent

> with respect to which the decedent possessed at his death, any of the incidents of ownership, exercisable either alone or in conjunction with any other person.

Treasury Regulations 105, promulgated under the Internal Revenue Code, at Section 81.27 [as amended by T. D. 5239, 1943 Cum. Bull. 1081, 1092, 1093, 1094] provides that the term "incidents of ownership" as used in the above section is not confined to ownership in the technical legal sense. The Regulation further says:

* * * * * *

> Incidents of ownership in the policy include, for example, the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

The statute, and the regulation, which is well within the scope of the statute, apply directly to the facts of the instant case. None of the rights exercisable under the policy could be exercised by the beneficiary without the written consent of the decedent insured. That meant that he "in conjunction with" the beneficiary, had all the incidents of ownership with respect to the policy. To say that his control was "*negative*" or in the nature of a veto power, does not diminish its effectiveness as an incident of ownership. It was, during his life, exactly equivalent to the control of the named beneficiary. Neither could act without the concurrence of the other.

The proceeds of the policies were properly included in the decedent's estate, for estate tax purposes, and the deficiency was lawfully collected.

The plaintiffs' petition will be dismissed.

It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

FINDINGS OF FACT.

The court, having considered the evidence, the report of Commissioner Richard H. Akers, and the briefs and argument of counsel, makes findings of fact as follows:

1. The plaintiffs, Ida Goldstein, Executrix, and Arnold Goldstein, Executor, are the duly appointed and acting executrix and executor of the Estate of Louis Goldstein, deceased. Ida Goldstein was the wife and Arnold Goldstein the son of the deceased.

2. Louis Goldstein departed this life testate on April 27, 1945, and in and by the terms of his last will and testament, which was duly admitted to probate in the Surrogate's Court, New York, N. Y., the plaintiffs were named executrix and executor. Letters testamentary were duly issued by the Surrogate on or about June 28, 1945.

3. The Federal estate tax return for the Estate of Louis Goldstein was filed on or about July 9, 1946, showing a tax liability of $43,350.40, all of which sum was paid. The payment was made to the Collector of Internal Revenue, Second New York Collection District. The aforesaid Collector of Internal Revenue is now deceased.

4. By letter dated June 26, 1947, after the report of an examination by a revenue agent, the plaintiffs were advised that a recomputation of the estate tax liability showed a total tax liability in the amount of $67,673.22, that is, a deficiency in the reported tax of $24,322.82. In arriving at that deficiency, there were added to the assets of the gross estate the proceeds of three policies of insurance on the life of the decedent issued by the Union Central Life Insurance Company, which had been returned in the tax return for information only. The amount included in the gross estate on that account was $82,970.64. The numbers

of the policies and the respective amounts making up this total are as follows:

No. 1331135.....	$25,000	dividend.....	$ 928.33
1331136.....	40,000	dividend.....	1,485.33
1331137.....	15,000	dividend.....	556.98

The reason assigned in the revenue agent's report for the inclusion of those amounts in the gross estate of the decedent was:

> Items 7, 8 and 9—Proceeds of insurance policies includible in gross estate of decedent pursuant to Sec. 811 (g) (2) I. R. C.

The deficiency tax was paid July 31, 1947.

5. On December 16, 1948, the plaintiffs filed a claim for refund in the amount of $23,644.22. The ground upon which refund was claimed was stated as follows:

> Insurance policies did not pass to the beneficiaries because of the death of the transferor. Decedent had no legal incidents of ownership in the life insurance policies valued at $82,970.64 and included for estate tax purposes. Transfers made within two years of decedent's death were not made in contemplation of death.

6. In a revenue agent's report on that claim, dated September 16, 1949, it was recommended that the claim be allowed in the amount of $1,228.17 and rejected for the balance. The proposed allowance did not result from any adjustment proposed in the claim for refund. With respect to the claim, the following statement appears in that report:

> Claim, Form 843, filed December 16, 1946 [1948] for refund of Federal estate tax resulting from the inclusion of proceeds of insurance policies in decedent's

gross estate is rejected. At the time of decedent's death, he possessed incidents of ownership which were never released by the amendments to the respective insurance policies. Said policies were properly included in decedent's gross estate pursuant to Section 811 (g) (2) I. R. C.

On September 8, 1949, the Acting Internal Revenue Agent advised the plaintiffs that the claim for refund referred to above was allowed for $1,301.18 and rejected for the balance.

7. The three insurance policies, referred to in finding 4, were issued on July 13, 1939, on the life of Louis Goldstein. The applications for policies numbered 1331135 and 1331136 were signed by Louis Goldstein, the decedent, as the "applicant", these applications being dated June 30, 1939. These applications contained, at the bottom of the left-hand side, a block with the following statement at the top thereof:

> This application is made at the instance and request of the undersigned, who will pay the premiums out of his, her or its funds, and who ratifies the foregoing representations, statements, answers and agreements.

There is then space for a signature with the following statement: "Signature of person who will pay the premiums." The application for policy numbered 1331135, in the amount of $25,000, named Frances Figler, daughter of decedent, as primary beneficiary, and her signature appears in the block above mentioned. The application for policy numbered 1331136, in the amount of $40,000, named Lillian Furst, decedent's daughter, as primary beneficiary, and her signature appears as the person who will pay the premiums. Frances Figler and Lillian Furst signed the applications at or about the same time as Louis Goldstein, the decedent.

No separate application was made for policy numbered 1331137 as explained later.

8. After these applications had been signed and before the policies were issued, the decedent, Louis Goldstein, filed an amendment of his application with respect to policies numbered 1331135 and 1331136. The application, signed by Louis Goldstein, stated as follows:

> I agree to this policy being issued with ownership and the privilege to change the beneficiary vesting in the beneficiary, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

With respect to policy numbered 1331137, for which no separate application was filed but which was issued naming Frances Figler as beneficiary and in the amount of $15,000, the decedent filed an amendment to the application filed on June 30, 1939, stating as follows:

> I agree to accept an additional policy for $15,000.00 with ownership and the privilege to change the beneficiary vesting in the beneficiary, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

9. When the three above-mentioned insurance policies were issued each contained the following typewritten provision:

> SECTION A.
>
> BENEFICIARY AND OWNERSHIP PROVISIONS.
>
> A 1. OWNERSHIP. The beneficiary herein named may exercise every right and receive every benefit reserved to the insured or the owner of the policy, including the right of assignment, and including the privilege to change the beneficiary, and may agree

with the Company to any change in or amendment of the policy without the consent of the insured, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

It was further provided in policies numbered 1331135 and 1331137 with respect to "BENEFICIARY" that "The net sum payable on the death of the insured shall be paid to Frances Figler, his daughter, her executors, administrators or assigns". The policy numbered 1331136 contained a similar provision with respect to Lillian Furst.

10. All the premiums on the above three policies were paid by the decedent. No attempt was ever made, prior to the decedent's death, by either of the beneficiaries named in the policies to exercise any rights under the policies.

11. The parties have stipulated that the proceeds of policy numbered 1330315, also issued by the Union Central Life Insurance Company, in the amount of $5,190.35 were properly includible in the decedent's gross estate. The plaintiffs included the proceeds of this policy in the estate tax return as a part of the decedent's gross estate.

CONCLUSION OF LAW.

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiffs are not entitled to recover, and the petition is therefore dismissed.

Report of Commissioner of Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS

No. 50270.

(Filed February 17, 1954.)

Estate of LOUIS GOLDSTEIN, IDA GOLDSTEIN and ARNOLD GOLDSTEIN, Executrix and Executor, 59 West 12th Street, New York City, N. Y., *v.* THE UNITED STATES.

To the honorable the Chief Judge and Associate Judges of the United States Court of Claims:

Pursuant to the order of reference in the above-entitled case, the following determination and report of the facts is submitted:

1. The plaintiffs, Ida Goldstein, Executrix, and Arnold Goldstein, Executor, are the duly appointed and acting executrix and executor of the Estate of Louis Goldstein, deceased. Ida Goldstein was the wife and Arnold Goldstein the son of the deceased.

2. Louis Goldstein departed this life testate on April 27, 1945, and in and by the terms of his last will and testament, which was duly admitted to probate in the Surrogate's Court, New York, N. Y., the plaintiffs were named executrix and executor. Letters testamentary were duly issued by the Surrogate on or about June 28, 1945.

3. The Federal estate tax return for the Estate of Louis Goldstein was filed on or about July 9, 1946, showing a tax liability of $43,350.40, all of which sum was paid. The pay-

ment was made to the Collector of Internal Revenue, Second New York Collection District. The aforesaid Collector of Internal Revenue is now deceased.

4. By letter dated June 26, 1947, after the report of an examination by a revenue agent, the plaintiffs were advised that a recomputation of the estate tax liability showed a total tax liability in the amount of $67,673.22, that is, a deficiency in the reported tax of $24,322.82. In arriving at that deficiency, there were added to the assets of the gross estate the proceeds of three policies of insurance on the life of the decedent issued by the Union Central Life Insurance Company, which had been returned in the tax return for information only. The amount included in the gross estate on that account was $82,970.64. The numbers of the policies and the respective amounts making up this total are as follows:

No. 1331135.....	$25,000	dividend.....	$ 928.33
1331136.....	40,000	dividend.....	1,485.33
1331137.....	15,000	dividend.....	556.98

The reason assigned in the revenue agent's report for the inclusion of those amounts in the gross estate of the decedent was:

> Items 7, 8 & 9—Proceeds of insurance policies includible in gross estate of decedent pursuant to Sec. 811 (g) (2) I. R. C.

The deficiency tax was paid July 31, 1947.

5. On December 16, 1948, the plaintiffs filed a claim for refund in the amount of $23,644.22. The ground upon which refund was claimed was stated as follows:

> Insurance policies did not pass to the beneficiaries because of the death of the transferor. Decedent had no legal incidents of ownership in the life insurance

policies valued at $82,970.64 and included for estate tax purposes. Transfers made within two years of decedent's death were not made in contemplation of death.

6. In a revenue agent's report on that claim, dated September 16, 1949, it was recommended that the claim be allowed in the amount of $1,228.17 and rejected for the balance. The proposed allowance did not result from any adjustment proposed in the claim for refund. With respect to the claim, the following statement appears in that report:

> Claim, Form 843, filed December 16, 1946 [1948] for refund of Federal estate tax resulting from the inclusion of proceeds of insurance policies in decedent's gross estate is rejected. At the time of decedent's death, he possessed incidents of ownership which were never released by the amendments to the respective insurance policies. Said policies were properly included in decedent's gross estate pursuant to Section 811 (g) (2) I. R. C.

On September 8, 1949, the Acting Internal Revenue Agent advised the plaintiffs that the claim for refund referred to above was allowed for $1,301.18 and rejected for the balance.

7. The three insurance policies, referred to in (finding) 4, were issued on July 13, 1939, on the life of Louis Goldstein. The applications for policies numbered 1331135 and 1331136 were signed by Louis Goldstein, the decedent, as the "applicant", these applications being dated June 30, 1939. These applications contained, at the bottom of the left-hand side, a block with the following statement at the top thereof:

> This application is made at the instance and request of the undersigned, who will pay the premiums out of

his, her or its funds, and who ratifies the foregoing representations, statements, answers and agreements.

There is then space for a signature with the following statement: "Signature of person who will pay the premiums." The application for policy numbered 1331135, in the amount of $25,000, named Frances Figler, daughter of decedent, as (primary) beneficiary, and her signature appears in the block above mentioned. The application for policy numbered 1331136, in the amount of $40,000, named Lillian Furst, decedent's daughter, (as primary) beneficiary, and her signature appears as the person who will pay the premiums. Frances Figler and Lillian Furst signed the applications at or about the same time as Louis Goldstein, the decedent.

No separate application was made for policy numbered 1331137 as explained later.

8. After these applications had been signed and before the policies were issued, the decedent, Louis Goldstein, filed an amendment of his application with respect to policies numbered 1331135 and 1331136. The application, signed by Louis Goldstein, stated as follows:

> I agree to this policy being issued with ownership and the privilege to change the beneficiary vesting in the beneficiary, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

With respect to policy numbered 1331137, for which no separate application was filed but which was issued naming Frances Figler as beneficary and in the amount of $15,000, the decedent filed an amendment to the application filed on June 30, 1939, stating as follows:

> I agree to accept an additional policy for $15,000.00 with ownership and the privilage to change the bene-

ficiary vesting in the beneficiary, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

9. When the three above-mentioned insurance policies were issued each contained the following typewritten provision:

SECTION A.

BENEFICIARY AND OWNERSHIP PROVISIONS.

A 1. OWNERSHIP. The beneficiary herein named may exercise every right and receive every benefit reserved to the insured or the owner of the policy, including the right of assignment, and including the privilege to change the beneficiary, and may agree with the Company to any change in or amendment of the policy without the consent of the insured, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

It was further provided in policies numbered 1331135 and 1331137 with respect to "BENEFICIARY" that "The net sum payable on the death of the insured shall be paid to Frances Figler, his daughter, her executors, administrators or assigns". The policy numbered 1331136 contained a similar provision with respect to Lillian Furst.

10. All the premiums on the above three policies were paid by the decedent.

No attempt was ever made, prior to the decedent's death, by either of the beneficiaries named in the policies to exercise any rights under the policies. However, prior to the decedent's death, the Insurance Company would not have complied with a request of either of these beneficiaries to exercise any of the rights conferred under the policies or receive any of the benefits thereunder without the consent of the insured, the decedent herein.

11. The parties have stipulated that the proceeds of policy numbered 1330315, also issued by the Union Central Life Insurance Company, in the amount of $5,190.35 were properly includible in the decedent's gross estate. The plaintiffs included the proceeds of this policy in the estate tax return as a part of the decedent's gross estate.

Respectfully submitted.

RICHARD H. AKERS,
Comissioner.

Report of Committee of Congress.

Revenue Act of 1942.

CB1942-2. Pages 372 and 504 at page 677,

"INCIDENTS OF OWNERSHIP"

"There is no specific enumeration of incidents of ownership, the possession of which at death forms the basis for inclusion of insurance proceeds in the gross estate, as it is impossible to include an exhaustive list. Examples of such incidents are the right of the *insured or his estate to the economic benefits of the insurance, the power to change the beneficiary, the power to surrender or cancel the policy, the power to assign it, the power to revoke an assignment, the power to pledge the policy for a loan, or the power to obtain from the insurer a loan against the surrender value of the policy.* Incidents of ownership are not confined to those possessed by the decedent in a technical sense. For example, a power to change the beneficiary reserved to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent. Your committee bill has added a provision to take reversionary interests out of the category of 'incidents of ownership' for the purpose of applying section 811 (g) (2) (a). THIS PROVISION SEEMS NECESSARY IN VIEW OF THE TREATMENT OF A REVERSIONARY INTEREST AS AN INCIDENT OF OWNERSHIP UNDER EXISTING LAW AND UNDER SUBSECTION (c) of the bill." (Emphasis supplied.)

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 498

ESTATE OF LOUIS GOLDSTEIN, IDA GOLDSTEIN AND ARNOLD GOLDSTEIN, EXECUTRIX AND EXECUTOR, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 11-13) is reported in 122 F. Supp. 677.

JURISDICTION

The judgment of the Court of Claims was entered July 13, 1954 (Pet. 18). A motion for rehearing was filed August 9, 1954, and overruled October 5, 1954. The petition for a writ of certiorari was filed on December 30, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the proceeds of insurance policies on decedent's life under which the named beneficiary could exercise every right and receive every benefit therein reserved to the insured, except that during the life of the insured his written consent had first to be obtained, are includible in the decedent's gross estate under Section 811(g)(2) of the Internal Revenue Code of 1939.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set forth in the petition, pages 2-5.

STATEMENT

This suit was brought in the Court of Claims for refund of estate taxes paid by petitioners. The suit was based upon the contention raised in a timely refund claim that an amount of $82,970.64, being the proceeds of three policies of life insurance, were not includible in the decedent's gross estate.

The three insurance policies were issued on July 13, 1939, on the application of the decedent. Policy No. 1331135, in the amount of $25,000, and Policy No. 1331137, in the amount of $15,000, named Frances Figler, daughter of the decedent, as primary beneficiary. Policy No. 1331136, in the amount of $40,000, named Lillian Furst, also a daughter of decedent, as primary beneficiary. After the applications for these policies had been signed, and before the policies were issued, the decedent amended the applications as follows (Pet. 16-17):

> I agree to this policy being issued with ownership and the privilege to change the beneficiary vesting in the beneficiary, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

When issued, each of the three policies contained the following provision (Pet. 17-18):

> BENEFICIARY AND OWNERSHIP PROVISIONS
>
> A. 1. OWNERSHIP. The beneficiary herein named may exercise every right and receive every benefit reserved to the insured or the owner of the policy, including the right of assignment, and including the privilege to change the beneficiary, and may agree with the Company to any change in or amendment of the policy without the consent of the insured, except that during the lifetime of Louis Goldstein, the insured, his written consent must first be obtained.

It was further provided in policies numbered 1331135 and 1331137 that the net sum payable on the death of the insured "shall be paid to Frances Figler, his daughter, her executors, administrators or assigns" (Pet. 18). A similar provision naming Lillian Furst appeared in policy numbered 1331136 (Pet. 18).

All the premiums on the above three policies were paid by the decedent. No attempt was ever made,

prior to the decedent's death, by either of the beneficiaries to exercise any rights under the policies (Pet. 18).

On these undisputed facts, the Court of Claims held that the proceeds of the policies had properly been included in the decedent's estate for estate tax purposes (Pet. 13).

ARGUMENT

This case presents no question calling for review by this Court. There is no conflict of decisions and none is asserted. The decision of the Court of Claims is correct.

Under Section 811(g)(2) of the Internal Revenue Code of 1939, as amended (Pet. 2-3), the proceeds of life insurance policies "with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person," must be included in the gross estate of the decedent. *Fernandez* v. *Wiener*, 326 U.S. 340, 363. The policies in question provided that the respective beneficiaries (both of whom were daughters of the decedent) could exercise every right and receive every benefit reserved to the insured by the policy, except that during the insured's lifetime "his written consent must first be obtained" to any exercise of such rights. As the Court of Claims said (Pet. 13):

> None of the rights exercisable under the policy could be exercised by the beneficiary without the written consent of the decedent insured.

> That meant that he "in conjunction with" the beneficiary, had all the incidents of ownership with respect to the policy. To say that his control was *"negative"* or in the nature of a veto power, does not diminish its effectiveness as an incident of ownership. It was, during his life, exactly equivalent to the control of the named beneficiary. Neither could act without the concurrence of the other.

It follows, as the court below held, that the proceeds of the policies were properly included in the decedent's estate for estate tax purposes. This result is particularly required in a case such as this where the beneficiaries with whom the decedent shared the power to exercise the rights of ownership were "of the grantor's immediate family" and hence "might be amenable to persuasion or be induced to consent to a revocation in consideration of other expected benefits from the grantor's estate." *Helvering* v. *City Bank Co.*, 296 U.S. 85, 90.

The decision below is in line with that of the Court of Appeals for the Third Circuit in *Thorp's Estate* v. *Commissioner*, 164 F. 2d 966, certiorari denied, 333 U.S. 843. In that case, the grantor of a trust provided that the trust could be terminated in whole or in part at the request of the beneficiaries, provided the consent in writing of the grantor was first obtained. The court there held that this reserved right was a "power" exercisable by the decedent-grantor "in conjunction with any per-

son" under 26 U.S.C. 1952 ed., Sec. 811(d)(2). The court explained (164 F. 2d at 968):

> As a practical matter, to interpret the statutory provision as applying solely when the settlor can take the first step toward terminating the trust would be to sanction "elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes." *Helvering* v. *Hallock,* 1940, 309 U.S. 106, 118 * * *.

Accord: *DuCharme's Estate* v. *Commissioner,* 164 F. 2d 959, modified on another issue, 169 F. 2d 76 (C.A. 6). And see Paul, *Federal Estate and Gift Taxation* (1946 Supp.), Section 10.37, p. 368.

The decisions cited by petitioner are not pertinent (Pet. 9). In *Chase National Bank* v. *United States,* 278 U.S. 327, this Court sustained the Constitutionality of an estate tax on the proceeds of insurance policies payable to named beneficiaries where the decedent reserved incidents of ownership in the policies, notwithstanding the fact that the interest of the beneficiaries therein had vested in them prior to the death of the insured. It is therefore a forerunner of the cases relied on by the Government. The lower court decisions cited by petitioner arose under the Revenue Act of 1926 which provided for the inclusion in the gross estate of a decedent proceeds of "policies taken out by the decedent upon his own life" (44 Stat. 71). In the 1942 Act, here relevant, Congress for the first time

expressly provided that the proceeds of insurance policies are includible in the estate of a decedent wherever the latter "possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person" (Pet. 3). This change, as the Tax Court has noted, is "fundamental" and "reveals that the purpose of Congress was to cut 'through elegant avoidance schemes' ". See *Estate of Selznick* v. *Commissioner*, 15 T.C. 716, 728, affirmed *per curiam*, 195 F. 2d 735 (C.A. 9).

CONCLUSION

The decision of the Court of Claims is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON B. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

JANUARY, 1955.

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